

1 Tyler J. Woods (State Bar No. 232464)
twoods@trialnewport.com
2 Tu-Quyen Pham (State Bar No. 260864)
tpham@trialnewport.com
3 **NEWPORT TRIAL GROUP**
A Professional Corporation
4 4100 Newport Place, Suite 800
Newport Beach, CA 92660
5 Tel: (949) 706-6464
Fax: (949) 706-6469
6

HIDEN, ROTT & OERTLE, LLP
A Limited Liability Partnership
Including Professional Corporations
8 **ERIC M. OVERHOLT, ESQ.** (C.S.B. 248762)
eoverholt@hrollp.com
9 2635 Camino del Rio South, Suite 306
San Diego, California 92108
10 Telephone: (619) 296-5884
Facsimile: (619) 296-5171
11

Attorneys for Plaintiff

12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15

16 **THERMOLIFE INTERNATIONAL, LLC**

17 Plaintiff,

18 vs.

19
20 **PROFIGHT SUPPLEMENTS,**

21 Defendant.
22

Case No. **'13CV2304 BEN WMC**

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Plaintiff Thermolife International, LLC ("Plaintiff") hereby alleges for its
 2 Complaint against ProFight Supplements ("Defendant"), on personal knowledge as
 3 to its own activities and on information and belief as to the activities of others, as
 4 follows:

5 I. THE PARTIES

6 1. Plaintiff is a limited liability company organized and existing under
 7 the laws of Arizona, with a place of business at 1811 Ocean Front Walk in Venice,
 8 California, 90291.

9 2. Plaintiff is and was at all relevant times the exclusive licensee of
 10 United States Patent No. 6,117,872, titled "Enhancement of Exercise Performance
 11 by Augmenting Endogenous Nitric Oxide Production or Activity," referred to
 12 herein as the "patent in suit."

13 3. The above patent is and was owned by The Board of Trustees of the
 14 Leland Stanford Junior University ("Stanford University") and Plaintiff exclusively
 15 licenses and licensed at all relevant times the patent from Stanford University.

16 4. Plaintiff has been given the right by Stanford University to institute
 17 suit with respect to infringements of the patent in suit, including this suit against
 18 Defendant.

19 5. Defendant is an entity organized and existing under the laws of
 20 California with a principal place of business at PO Box 15584 in Beverly Hills,
 21 California, 90209.

22 II. JURISDICTION AND VENUE

23 6. This is an action for patent infringement arising under the patent laws
 24 of the United States, Title 35 of the United States Code. Accordingly, this Court has
 25 subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

26 7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and
 27 1400.

28 ///

1 8. This Court has personal jurisdiction over Defendant. By way of
2 example and without limitation, Defendant, directly or through intermediaries
3 (including distributors, retailers, and others), makes, manufactures, ships,
4 distributes, advertises, markets, offers for sale, and/or sells dietary supplement
5 products that infringe on one or more claims of the patent in suit (hereinafter the
6 “accused products”), which include without limitation products sold under the
7 “MegaNO2” brand name, in the United States, the State of California, and the
8 Southern District of California.

9 9. By way of further example and without limitation, Defendant has
10 purposefully and voluntarily placed the accused products into the stream of
11 commerce with the expectation that they will be purchased in the Southern District
12 of California, and the products are actually purchased in the Southern District of
13 California.

14 **III. THE DEFENDANT’S INFRINGEMENTS**

15 10. Defendant has committed the tort of patent infringement within the
16 State of California, and more particularly, within the Southern District of
17 California, by virtue of the fact that Defendant has formulated, made,
18 manufactured, shipped, distributed, advertised, offered for sale, and/or sold the
19 accused products in this District, and continues to do so.

20 **A. DIRECT INFRINGEMENTS**

21 11. Defendant’s employees, agents, representatives and other persons
22 sponsored by or who endorse Defendant and Defendant’s products in advertising
23 and marketing activities, have taken, used, and orally administered the accused
24 products.

25 12. The accused products are formulated, made, manufactured, shipped,
26 distributed, advertised, offered for sale, and sold by Defendant to include certain
27 ingredients that, by virtue of their inclusion in the products, infringe one or more
28 claims of one or more of the patent in suit.

1 13. The accused products are formulated, made, manufactured, shipped,
2 distributed, advertised, offered for sale, and sold by Defendant to include specific
3 ingredients for certain purposes that, by virtue of their inclusion in the products for
4 such purposes, infringe one or more claims of the patent in suit, and as a result,
5 when Defendant's employees, agents, representatives and other persons sponsored
6 by or who endorse Defendant and Defendant's products in advertising and
7 marketing activities orally administer the accused products, they are practicing and
8 they practiced the methods disclosed in those claims.

9 14. The purposes for which these ingredients are included in the accused
10 products are and were, without limitation, to enhance nitric oxide production, to
11 improve nitric oxide activity, to produce nitric oxide, to boost nitric oxide levels in
12 the body, and to enhance physical performance.

13 15. Defendant encouraged and/or is aware of the fact that its employees,
14 agents, representatives and other persons sponsored by Defendant or who endorse
15 Defendant and Defendant's products in advertising and marketing activities orally
16 administered and administer the accused products and practice and practiced the
17 methods disclosed in one or more claims of the patent in suit, and these employees,
18 agents, representatives and other persons sponsored by Defendant or who endorse
19 Defendant and Defendant's products in advertising and marketing activities are and
20 were acting under Defendant's direction and control when practicing those
21 methods.

22 16. Therefore, Defendant is and was a direct infringer of one or more
23 claims of the patent in suit, and Defendant practices and practiced the methods as
24 set forth in one or more claims of the patent in suit.

25 **B. INDIRECT INFRINGEMENTS**

26 17. End-users of Defendant's accused products were and are also direct
27 infringers of one or more claims of the patent in suit.

28 ///

1 18. End-users of Defendant's accused products have taken, used, and
2 orally administered the accused products.

3 19. The accused products are and were formulated, made, manufactured,
4 shipped, distributed, advertised, offered for sale, and/or sold by Defendant to
5 include certain ingredients that, by virtue of their inclusion in the products, infringe
6 and infringed one or more claims of the patent in suit.

7 20. The accused products are and were formulated, made, manufactured,
8 shipped, distributed, advertised, offered for sale, and/or sold by Defendant to
9 include specific ingredients for certain purposes that, because of their inclusion in
10 the products for such purposes, infringe and infringed one or more claims of the
11 patent in suit, and as a result, when end-users of Defendant's accused products
12 orally administer and administered the accused products, they are and were
13 practicing the methods disclosed in those claims.

14 21. Defendant's labels and advertising for the accused products explain
15 and explained the elements and essential elements of one or more of the methods
16 disclosed in the patent in suit, and those labels and advertising statements
17 encourage, urge, and induce the accused products' end-users, and did so in the past,
18 to purchase and orally ingest the products to practice those methods, and end-users
19 do and did practice those methods.

20 22. Defendant has therefore specifically intended to cause these end-users
21 to directly infringe the claimed methods of this patent, and in fact urged them to do
22 so.

23 23. The accused products are and were not suitable for non-infringing
24 uses, and none of Defendant's labels or advertisements for the accused products
25 disclose or disclosed any uses for the products, nor for the compounds disclosed in
26 the claimed methods of the patent in suit, that do not infringe upon such methods.

27 24. The inclusion of the specific infringing compounds in the products is
28 and was material to practicing such methods.

1 25. Defendant has and had knowledge that the accused products are and
2 were especially adapted by end-users of the products for the practicing of such
3 methods, and, indeed, Defendant encourages, urges, and induces the accused
4 products' end-users to purchase and orally administer the accused products to
5 practice such methods, and has done so in the past.

6 26. Defendant intentionally and knowingly induced, encouraged, and
7 urged end-users of the accused products to purchase and orally administer the
8 accused products for the purposes of practicing the claimed methods, by having
9 them orally ingest the compounds disclosed in such claims.

10 27. Defendant has and had knowledge of the fact that the accused
11 products, particularly as administered, infringe on one or more claims of the patent
12 in suit.

13 28. Defendant has and had direct, firsthand knowledge of the patent in
14 suit.

15 29. For example and without limitation, Plaintiff believes Defendant has
16 had knowledge of the patent in suit since November 2006, when an ongoing
17 settlement of a patent infringement case relating to the patent suit and other related
18 patents against Herbalife, a well-known company in Defendant's industry, was
19 announced in press releases issued in a highly publicized manner. Plaintiff believes
20 Defendant's employees, agents, and representatives saw the press releases and were
21 aware of the settlement and thus the patent in suit.

22 30. By way of further example and without limitation, Defendant sold its
23 products through retailers, including online retailers, and those retailers have sold
24 other companies' products whose labels and/or advertisements have been
25 prominently marked with the patent in suit and/or related patents, by patent number,
26 including without limitation, upon information and belief, the products
27 manufactured and sold by Herbalife, Daily Wellness, and Vitality Research Labs.
28 Defendant's employees, agents, and representatives have seen these labels and

1 advertisements and, thus, Defendant has and had direct knowledge of the patent in
2 suit.

3 31. By way of further example and without limitation, Defendant received
4 written notice of the patent in suit from Plaintiff in April 2013.

5 32. Defendant brazenly and willfully decided to infringe the patent in suit
6 despite knowledge of the patent's existence and its knowledge of the accused
7 products' infringements of the patent.

8 33. At a minimum, and in the alternative, Plaintiff pleads that Defendant
9 willfully blinded itself to the infringing nature of the accused products' sales.

10 34. Defendant did not cease its own direct infringement, nor its
11 contributory infringement or inducement of infringement by end-users, despite its
12 knowledge of the patent in suit and the end-users' infringing activities with respect
13 to the patent in suit.

14 **IV. FIRST CAUSE OF ACTION**

15 **Infringement of U.S. Patent No. 6,117,872**

16 35. Plaintiff repeats and re-alleges the allegations of the foregoing
17 paragraphs of this Complaint as if fully set forth herein.

18 36. Defendant has in the past and still is literally and directly infringing or
19 directly infringing under the doctrine of equivalents one or more claims of United
20 States Patent No. 6,117,872 by making, using, selling, and offering for sale the
21 accused products, or any one of those products, and will continue to do so unless
22 enjoined by this Court.

23 37. In addition to the fact that Defendant makes, uses, sells, and offers for
24 sale the accused products, further examples of Defendant's direct infringements
25 include, without limitation, the fact that Defendant has encouraged and/or is aware
26 of the fact that its employees, agents, representatives and other persons sponsored
27 by or who endorse Defendant and Defendant's products in advertising and
28 marketing activities orally administer the accused products and practice the

1 methods disclosed in one or more claims of United States Patent No. 6,117,872,
2 and these employees, agents, representatives and other persons sponsored by or
3 who endorse Defendant and Defendant's products in advertising and marketing
4 activities are acting under Defendant's direction and control when practicing those
5 methods.

6 38. Defendant has encouraged and is aware of these persons' oral
7 administration of the accused products for these purposes, these persons are acting
8 under Defendant's direction and control, and therefore Defendant is directly
9 practicing the methods disclosed in United States Patent No. 6,117,872.

10 39. End-users of Defendant's accused products are also direct infringers of
11 one or more claims of United States Patent No. 6,117,872.

12 40. End-users of Defendant's accused products have taken, used, and
13 orally administered the accused products.

14 41. The accused products are formulated, made, manufactured, shipped,
15 distributed, advertised, offered for sale, and sold by Defendant to include certain
16 ingredients that, by virtue of their inclusion in the products, infringe one or more
17 claims of United States Patent No. 6,117,872.

18 42. The accused products is formulated, made, manufactured, shipped,
19 distributed, advertised, offered for sale, and sold by Defendant to include specific
20 ingredients for purposes that, by their inclusion in the products for such purposes,
21 infringe one or more claims of United States Patent No. 6,117,872, and as a result,
22 when end-users of Defendant's accused products orally administer the accused
23 products, they are practicing the methods disclosed in one or more claims of that
24 patent.

25 43. Defendant's labels and advertising for the accused products explain the
26 elements and essential elements of the methods disclosed in United States Patent
27 No. 6,117,872, and those labels and advertising statements encourage, urge, and

28 ///

1 induce the accused products' end-users to purchase and orally ingest the products to
2 practice those methods, and end-users do practice those methods.

3 44. Defendant has therefore specifically intended to cause these end-users
4 to directly infringe the claimed methods of United States Patent No. 6,117,872, and
5 has in fact urged them to do so.

6 45. The accused products are not suitable for non-infringing uses, and
7 none of Defendant's labels or advertisements for the accused products disclose any
8 uses for the products, nor for the compounds disclosed in the claimed methods, that
9 do not infringe upon such methods.

10 46. The inclusion of these specific infringing compounds in the products is
11 material to practicing such methods.

12 47. Defendant has knowledge that the accused products are especially
13 adapted by end-users of the products for the practicing of such methods, and,
14 indeed, Defendant encourages, urges, and induces the accused products' end-users
15 to purchase and orally administer the accused products to practice such methods,
16 and have done so in the past.

17 48. Defendant has intentionally and knowingly induced, encouraged, and
18 urged end-users of the accused products to purchase and orally administer the
19 accused products for the purposes disclosed in one or more claims of United States
20 Patent No. 6,117,872, by having them orally ingest the compounds disclosed in
21 such claims.

22 49. Defendant has knowledge of the fact that the accused products,
23 particularly as administered, infringe on one or more claims of United States Patent
24 No. 6,117,872.

25 50. Defendant also has direct, firsthand knowledge of United States Patent
26 No. 6,117,872.

27 51. Defendant's activities have been without express or implied license by
28 Plaintiff.

1 52. As a result of Defendant's acts of infringement, Plaintiff has suffered
2 and will continue to suffer damages in an amount to be proved at trial.

3 53. As a result of Defendant's acts of infringement, Plaintiff has been and
4 will continue to be irreparably harmed by Defendant's infringements, which will
5 continue unless Defendant is enjoined by this Court.

6 54. Defendant's past infringements and/or continuing infringements have
7 been deliberate and willful, and this case is therefore an exceptional case, which
8 warrants an award of treble damages and attorneys' fees in accordance with 35
9 U.S.C. § 285.

10 **V. PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays for entry of judgment against Defendant as
12 follows:

13 1. A declaration that Defendant has infringed the patent in suit, under 35
14 U.S.C. §§ 271 *et seq.*;

15 2. That injunctions, preliminary and permanent, be issued by this Court
16 restraining Defendant, its officers, agents, servants, directors, and employees, and
17 all persons in active concert or participation with each, from directly or indirectly
18 infringing, or inducing or contributing to the infringement by others of, the patent
19 in suit;

20 3. That Defendant be required to provide to Plaintiff an accounting of all
21 gains, profits, and advantages derived by Defendant's infringement of the patent in
22 suit, and that Plaintiff be awarded damages adequate to compensate Plaintiff for the
23 wrongful infringing acts by Defendant, in accordance with 35 U.S.C. § 284;

24 4. That the damages awarded to Plaintiff with regard to the patent in suit
25 be increased up to three times, in view of Defendant's willful infringement, in
26 accordance with 35 U.S.C. § 284;

27 5. That this case be declared to be exceptional in favor of Plaintiff under
28 35 U.S.C. § 285, and that Plaintiff be awarded its reasonable attorneys' fees and

1 other expenses incurred in connection with this action;

2 6. That Plaintiff be awarded its interest and costs of suit incurred in this
3 action;

4 7. Compensatory damages;

5 8. Punitive damages; and

6 9. That Plaintiff be awarded such other and further relief as this Court
7 may deem just and proper.

8 **DEMAND FOR JURY TRIAL**

9 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a
10 jury trial for all issues in this case that properly are subject to a jury trial.

11
12 DATED: September 25, 2013

HIDEN, ROTT & OERTLE, LLP

13
14 By: 

15 Eric M. Overholt, Esq.
16 *Attorneys for Plaintiff*
17
18
19
20
21
22
23
24
25
26
27
28

HIDEN, ROTT & OERTLE, LLP

2635 Camino Del Rio South, Suite 306
San Diego, California 92108
TEL (619) 296-5884 FAX (619) 296-5171